

IN THE SUPREME COURT OF THE UNITED STATES

No. 05A578

C.T. HANFT, UNITED STATES NAVY COMMANDER,
CONSOLIDATED NAVAL BRIG, APPLICANT

v.

JOSE PADILLA

REPLY BRIEF IN SUPPORT OF THE GOVERNMENT'S APPLICATION
RESPECTING THE CUSTODY AND TRANSFER OF JOSE PADILLA

Just days ago, Padilla urged the court of appeals to "order his immediate transfer to civilian custody," and to grant the government's transfer application "immediately." Padilla C.A. Supp. Br. 1, 36. In this Court, however, Padilla expresses a willingness to prolong his military custody by at least two weeks until the Court acts on his petition for certiorari.¹ That remarkable position -- a request by a habeas petitioner seeking his release from military custody to remain in military custody -- appears to be premised on a belief that delaying his transfer to civilian custody by two weeks will somehow enhance the prospect

¹The Court is scheduled to consider Padilla's petition for a writ of certiorari at its January 13, 2006 Conference. It is of course possible, however, that the Court will not dispose of the petition at that Conference and instead relist the case for consideration at a later date.

that this Court will grant Padilla's petition for certiorari. But the questions of whether to grant Padilla's petition and whether to allow his transfer out of military custody are independent.

1. As Padilla effectively concedes (see Resp. 4), his release from military custody will be appropriate in two weeks no matter how this Court resolves his petition for certiorari. If certiorari is denied, there will be no basis for preventing his release and transfer for criminal prosecution. If the Court finds Padilla's challenge to his military detention to be moot in light of the intervening events, there will be no basis for preventing his release and transfer out of military custody. And if the Court grants the petition and sets the case for plenary review, there would still be no basis for preventing the transfer and forcing Padilla to remain in military custody for several more months against the wishes of both the Executive and Padilla. In light of that fact, there is no reason to defer action on the transfer application for two weeks. Granting the application will not prejudice this Court's consideration of Padilla's petition for certiorari. It would, however, eliminate the anomaly of a citizen being held by the military against the wishes of both the Executive and the detainee (at least in all but the short run).

The decision whether to grant the application is likewise independent of the question of whether the case is or becomes moot. The government believes this case is moot and does not fall within

any exception to the mootness doctrine. See 05-533 Br. In Opp. 13-19. Padilla takes a different view. But nothing in that dispute turns on whether the transfer takes place today or two weeks hence. The whole point of the mootness doctrine is that Article III's case-or-controversy requirement must be satisfied throughout the entire course of the litigation. See Spencer v. Kemma, 523 U.S. 1, 7 (1998). To be sure, the fact that the Executive has determined that the interests of the United States are best served by pursuing criminal charges (which, if proved, could lead to a criminal sentence of up to life imprisonment) may moot Padilla's challenge to his military detention or may provide a prudential reason for denying the petition. But that is the consequence of an exercise of Executive discretion that has already been made. Unless the Court were to attempt to enjoin the prosecution or force the Executive to maintain Padilla's military detention until a final decision on the merits (which even Padilla does not suggest the Court could or should do), the Court will need to consider the effect of Padilla's release from military detention and transfer for criminal prosecution. Simply deferring the release and transfer until after the Court acts on the petition for certiorari will not affect the mootness analysis.

The bottom line remains that, at this point, the basis for Padilla's continued military detention as an enemy combatant is the Fourth Circuit's mistaken order. Padilla makes no effort to defend

that unprecedented order on its merits. Indeed, Padilla notes that this Court could avoid any difficult issues by "simply find[ing] that the Court of Appeals had no basis for failing to authorize Padilla's transfer when Padilla himself consented to the transfer." See Resp. 6 n.4. The alternative is to let an order stand that purports -- on the basis of an assumption that this Court's own Rules apply to the transfer at issue and authorize a court to disallow the transfer -- to prevent the President from releasing a citizen from military custody and transferring him to civilian custody to stand trial for serious criminal offenses.

2. Padilla suggests (Resp. 8-10) that this Court lacks the authority to correct the court of appeals' mistaken Rule 36 determination or otherwise recognize the release and transfer of Padilla, except by petition for certiorari or mandamus. That position is difficult to square with either common sense or the text of Rule 36. In the first place, it would be anomalous if a court of appeals' mistaken application of one of this Court's own rules, which is clearly designed to provide limited authority to deal with an ancillary aspect of a case already subject to a pending petition for certiorari, could be corrected only by the Court's consideration of an independent petition for certiorari, which presumably would be on a separate and slower track.

Unlike Rule 23 of the Federal Rules of Appellate Procedure, which does not otherwise relate to a case pending in this Court,

Rule 36 addresses only cases already pending before this Court. Accordingly, it makes perfect sense that disputes over recurring issues under Rule 23 of the Appellate Rules would be considered by this Court on certiorari, cf. Hilton v. Braunskill, 481 U.S. 770 (1986), while Rule 36 would provide this Court with direct authority to correct misapplications of the Rule by lower courts to cases already pending review in this Court.

Rule 36.4 provides that authority directly by authorizing this Court to modify "an initial order respecting the custody or enlargement of the prisoner." Padilla appears to suggest that the "initial order" referred to in Rule 36.4 references the underlying "decisions granting or denying habeas relief." Resp. 9. But Rule 36.4's provision of authority to modify "an initial order respecting the custody or enlargement of the prisoner" clearly refers to initial orders under Rule 36. Other statutes and rules specify the means for appellate review of the underlying habeas case. Rule 36.4, by contrast, provides specific authority for review of orders entered by lower courts under Rule 36.

Alternatively, when a lower court denies a transfer application and this Court, based on its own independent examination of the proposed transfer, would grant the application, the Court can do so under Rule 36 without formally reviewing the court of appeals' order. In this way, Rule 36 tracks the practice followed with respect to stay requests, where a party ordinarily

must seek relief from a lower court before seeking relief from this Court. Under that construction, the Rule would prevent this Court from having to entertain transfer applications in all but the extraordinary case, such as this one, where the court of appeals refuses to grant a transfer application. Even Padilla states that, "by its plain terms, [Rule 36] allows the government to seek approval of a prisoner transfer in the first instance in either the court of appeals or in this Court." Resp. 3. And Padilla further notes that the Court can simply "den[y] or grant[] the government's application, and need not 'affirm' or 'reverse' the Fourth Circuit's December order." Id. at 10 n.8. In any event, the fact that the government first presented the court of appeals with an opportunity to grant its unopposed transfer application should not be held against it in seeking this Court's action.

Even if this Court deferred consideration of the government's application by two weeks, Rule 36 would still provide the proper basis for correcting the Fourth Circuit's erroneous order or, at a minimum, authorizing the release and transfer of Padilla. As an alternative, Padilla suggests that this Court could grant the petition for certiorari and then grant the habeas petition on the merits in part in advance of any briefing or argument on the case on the merits. There is no support for that novel theory. Padilla has filed a petition for certiorari seeking review of the Fourth Circuit's September 9, 2005, ruling, not an original habeas

petition. The mere grant of certiorari would not entitle Padilla to any relief. The "decision in a habeas corpus proceeding" would still be "[p]ending review in this Court," and Rule 36 would still provide the basis for granting the government's application.²

3. Padilla suggests (Resp. 5, 15) that the government seeks an "advisory opinion" on the meaning of Rule 36. That is incorrect. There is nothing speculative about the government's request. The President has directed the Secretary of Defense to release Padilla from military custody and transfer him to the control of the Attorney General, upon the request of the Attorney General. The Executive has made clear its intention to carry out that presidential order as soon as possible. More to the point, the only thing that currently is keeping Padilla in military custody is the court of appeals' decision refusing -- based on an assumption that Rule 36 applies to the transfer -- to give effect to the President's order and thus effectively purporting to block the release and transfer of Padilla out of military custody. There is, accordingly, a direct dispute over whether Rule 36 may be invoked by the courts to stand in the way of the Executive's

² Padilla suggests (Resp. 7-8) that a "mandamus" petition provides an alternative mechanism for review that precludes resort to Rule 36. That would appear to get matters backwards. The party seeking mandamus bears the burden of showing that other means of relief are unavailable, and here Rule 36 provides an avenue of relief. For this reason, the government relied on the All Writs Act as an alternative means to correct the Fourth Circuit's erroneous ruling if the Court concludes that Rule 36 does not provide a basis for granting the application.

transfer of Padilla out of military custody.

Padilla also argues (Resp. 10) the government is somehow “estopped” from contending that Rule 36 does not provide the courts with the authority to superintend, let alone preclude, the kind of release from challenged military custody and transfer to civilian custody for criminal charges at issue here. That contention has no merit. The government never waived the argument that Rule 36 has no application to the unique circumstances of this case. The government made that argument in the Fourth Circuit, and pointed out in its initial unopposed transfer application that it filed the application only out of an abundance of caution. See Gov’t C.A. Appl. 4. Padilla’s estoppel argument asks the Court to penalize such caution. Parties who in good faith believe that a court rule or order is inapplicable do not face an all-or-nothing choice between waiving that argument or potentially violating the rule or order. It is common practice for parties to make and preserve an argument that a rule is inapplicable or a court lacks jurisdiction while seeking relief in the alternative. And when a court holds (or, as here, merely assumes) the rule applicable and denies relief, that party is not without any remedy.³

³If resort to the doctrine of estoppel is appropriate at all in this case, it is to bar Padilla’s new position that he should remain in military custody pending consideration of his petition for certiorari. Padilla’s habeas challenge is framed expressly in terms of seeking his release from military custody and Padilla argued below that the court of appeals should “immediately” grant the government’s transfer application. Padilla C.A. Supp. 39.

* * * * *

The Fourth Circuit's order denied an unopposed transfer application and purports to require the military to detain a citizen as an enemy combatant contrary to the determination of the President. A citizen remains detained in military custody as a result of the order of a court, not of a military officer or the President. The Fourth Circuit issued that extraordinary order on the mere assumption that a procedural rule of this Court gave it that remarkable authority. Allowing that order to stand raises serious constitutional issues. Correcting it does not. A determination that Rule 36 does not apply in this unique situation, or that the transfer is appropriate to the extent the Rules does apply, would not raise any constitutional concerns. As even Padilla concedes, this Court can avoid resolving "any profound constitutional questions" by finding "that the Court of Appeals had no basis for failing to authorize Padilla's transfer when Padilla himself consented to the transfer." Resp. 6 n.4. There is no basis for allowing that unprecedented order to stand, and no reason for this Court to wait a day longer than necessary to make clear that nothing in Rule 36 (or any other provision) stands in the way of giving effect to the President's order to release and transfer Padilla out of military custody for civilian detention.

CONCLUSION

For the foregoing reasons, and those stated in the Application Respecting the Transfer of Jose Padilla, the Court should clarify that Rule 36 does not apply to the transfer at issue or, in the alternative, grant the application as expeditiously as possible.

Respectfully submitted.

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JANUARY 2006